THE GOVERNMENT OF THE FEDERATION OF MALAYSIA

v.

DATUK HAJI GHANI GILONG

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K. 522 OF 1987]
16 DECEMBER 1992

REVENUE LAW: Income Tax - Assessment & additional assessment - Application for summary judgment - Order 14 - Certificate confirming outstanding tax - Whether valid - Certificate signed by acting assistant director - Whether with full authority; appeal to Special Commissioners not dealt with yet - Whether claim premature - Whether unconstitutional - Art 13(1) of the Federal Constitution; additional assessment raised after 12 years - Whether claim statute-barred; stay of execution - Application - Whether should be allowed.

CIVIL PRACTICE & PROCEDURE: Application for stay of execution - Appeal to Special Commissioners still not heard - Delay not due to taxpayer - Whether application should be allowed.

The defendant was assessed as provided by the Income Tax Act 1967 ('the Act') and asked to settle his income tax in the sum of RM522,935.22 for years of assessment 1970, 1982, 1983 and 1984, together with additional tax for years 1971, 1972 and 1973. The certificate confirming the outstanding tax was signed by an acting assistant director. The claim was filed on 30 March 1987. The Inland Revenue applied for summary judgment under O. 14.

Held:

[1] The certificate was valid.

Words in statutes such as the Income Tax Act which is penal in nature must be construed within the rule of strict construction. An 'acting' official is within the ambit of the Act and she can sign valid certificates under the Act. Section 7 of the Interpretation Acts of 1948 and 1967 (Consolidated and Revised 1989) states that a reference to the holder of any public office is a reference to the person for the time being lawfully holding, acting in or exercising the functions of that office. [See also s. 93(2) of the same Acts.] In this respect 'function' includes power and duty.

[2] The claim for the additional assessments and added penalties was not unconstitutional by virtue of Art 13 of the Federal Constitution. The fact that the taxpayer denied owing the additional tax assessed was not a sufficient defence. The director general had exercised his powers under s. 91(1) of the Act and made the assessments. The normal rules for triable issues under O. 14 do not apply to cases of this nature.

Section 103(1) provides that the tax payable under an assessment or a composite assessment becomes due and payable on the service of the notice of assessment or composite assessment on the person assessed whether or not that person appeals against it or not. Section 106(3) provides that in any proceedings commenced by the government under s. 106(1) for the recovery of tax by civil proceedings as a debt due to the government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, under appeal or incorrectly increased under s. 103(4) or (5). There is finality of assessment in certain circumstances. The word assessment is defined in s. 2 to mean any assessment and the word 'sufficient' in s. 142(1) means that it is conclusive for the purpose of O. 14 r. 1.

[3] The additional assessment for 1971 of RM51,244.16 was statute-barred, and must be deducted from the total claimed. The notice of assessment was not issued and served within the time prescribed under s. 91(1) of the Act. There was no proof or even allegation of either wilful neglect or fraud on the part of the defendant.

An assessment must be issued within 12 years, unless there was an allegation of fraud or wilful default or neglect on the part of the taxpayer, when an assessment may be made at any time, as provided by s. 91(3). Commencement of proceedings, on the other hand, may take place at any time, provided the lapse of time between assessment and legal action is reasonable and there is no laches or neglect by the Inland Revenue Authority (IRA), and the IRA has not been dilatory in assessing and serving the notice of assessment.

[4] A stay of execution should be granted until determination by the Special Commissioners of the defendant's appeal against the assessment raised against him in the action.

It was not due to any fault on the part of the taxpayer that his appeal to them has yet to be heard.

[*Order in terms of plaintiff's application granted subject to deduction of RM51,244.16 Stay of execution granted.*]

Cases referred to:

Arumugam Pillai v. Government of Malaysia [1975] 2 MLJ 29 ***(refd)***

Comptroller-General of Inland Revenue v. N.P. [1973] 1 MLJ 165 ***(refd)***

Government of Malaysia v. Abdul Rahman [1975] 1 MLJ 276 ***(refd)***

Chong Woo Yit v. Government of Malaysia [1989] 1 MLJ 473 ***(foll)***

Government of Malaysia v. Lin Ting Hsi [1976] 2 MLJ 141 ***(foll)***

Sun Man Tobacco Co. Ltd. v. Government of Malaysia [1973] 2 MLJ 164 ***(refd)***

Government of Malaysia v. Gan Chuan Lian @ Gan Puay Chee [1992] 1 CLJ 679 ***(refd)***

Government of Malaysia v. Ng Song Choon [1975] 1 MLJ 131 ***(foll)***

Inland Revenue Commissioners v. Ross and Coulter & Ors. (Bladnoch Distillery Co. Ltd.) [1948] 1 All ER 616-693 ***(refd)***

The King v. The Deputy Federal Commissioner of Taxation for South Australia exparte Hooper L [1926] 37 CLR, 368 ***(refd)***

A.B.C. v. The Comptroller of Income Tax Singapore [1959] 25 MLJ 162 ***(refd)***

Wigens v. Cook 28 L JCP 312 ***(refd)***

Legislation referred to:

Federal Constitution, Article 13(1)

Income Tax Act 1967, ss. 2, 91(1), (3), 103(1), (4) or (5), 106(1), (3), 134(2)(c), 136, 142(1), (2), 143(1)

Interpretation Acts of 1948 and 1967, ss. 7, 93(2) (Consolidated and Revised 1989)

Limitation Act 1953, s. 33(1)

Rules of the High Court 1980, O. 5 r. 1, O. 14 r. 1

For the plaintiff - Mohamed Bazain bin Idris; Senior Federal Counsel

For the defendant - Philip V.K. Lee; M/s. Lee & Aziz

JUDGMENT

Syed Ahmad Idid J:

The defendant was asked to settle his income tax in the sum of RM522,935.22 for Years of Assessment 1970, 1982, 1983 and 1984 together with Additional Tax for years 1971, 1972 and 1973. Puan Norlia bte Zainol, who issued a certificate on 10 August 1987 confirming the defendant's outstanding tax, signed as "Pemangku Penolong Pengarah" (or Acting Assistant Director).

The claim was filed on 30 March 1987. Since then it has been brought up in Court on eleven occasions. The action did not receive the attention it deserves despite the Government of Malaysia filing the summons-in-chambers way back on 25 April 1988. The defendant only filed his affidavit-in-opposition as lately as on 14 September 1991.

At the hearing on the O. 14 application for summary judgment by the Inland Revenue on 11 November 1992, learned Counsel accepted that the defendant is liable on and agrees to pay only RM14,059.18. Mr. Philip Lee additionally raises three defences:

(1) The certificate signed by the "Acting" Assistant Director (at Exhibit "B") is "null and void and of no evidential value" despite its issue under s. 142(1), Income Tax Act 1967.

(2) The claim is premature as defendant's appeal has not been dealt by the Special Commissioners and so it is unconstitutional by virtue of Article 13(1) of the Federal Constitution.

(3) The additional assessment for Year 1971 was raised only on 4 August 1984 which is more than 12 years (Exhibit "A-2") and the claim is therefore time-barred.

Does An Official In "Acting" Capacity Have The Full Authority?

Is an "acting" official within the ambit of the Act and can he/she sign valid certificate under s. 142(1) of the Income Tax Act? Section 142(1) mentions "certificate signed by the Director-General" and s. 142(2) states "statement purporting to be signed by the Director-General of an authorised officer ...". It is only just and proper that Courts construe words in statutes such as the Income Tax Act which is penal in nature within the rule of strict construction. Section 136, Delegation of Director-General's functions, makes it clear that the Deputy Director-General, the Assistant Director-General the Senior Assistant and Assistant Director may exercise the functions of the Director-General except those restricted specifically. By s. 134, the "care and management of the tax" is placed with the Director-General of Inland Revenue and his staff are set out therein including "such other officers as may be necessary and expedient for the administration of the Act" (s. 134(2)(c)). Those "such

other officers" are, for all intents and purposes, vested with the full powers to act, to issue certificates and to compound offences. What about those in acting positions or capacity? Encik Bazain only quoted s. 136. In law, there may be occasions when the answers or amplification may lie outside the Act. So indeed, both Counsel were not helpful on this aspect. Actually the answer stares at us from s. 7 of the Interpretation Acts of 1948 and 1967 (Consolidated and Revised 1989) which states that a reference to the holder of any public office ... is a reference to the person for the time being lawfully holding, **ACTING** in or exercising the functions of that office. See also s. 93(2) of the same Acts. In this respect "function" includes power and duty. On that authority, I rule that the certificate is valid.

Constitutional Challenge:

When a taxpayer raises the constitutional issue that "no person shall be deprived of property save in accordance with the law", can the fact that he denies owing the additional tax assessed for years 1971, 1972 and 1973 be a sufficient defence? This has been amply treated in *Arumugam Pillai v. Government of Malaysia* [1975] 2 MLJ 29; and *Comptroller-General of Inland Revenue v. N.P.* [1973] 1 MLJ 165.

When proceedings are commenced under O. 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when the defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under s. 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the government under s. 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5). In this case the Director-General had exercised his powers under s. 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within 30 days further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due to the government. Regarding payment of tax, s. 103(1) reads:

> ... Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.

"It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that, the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not". per Arulanandom J. in *Government of Malaysia v. Abdul Rahman* [1975] 1 MLJ 276. This statement was agreed to and approved by the Supreme Court in *Chong Woo Yit v. Government of Malaysia* [1989] 1 MLJ 473. But I am of the opinion there can be a finality of assessment in these instances

(a) there is no valid notice of appeal against an assessment;
(b) there is an agreement on the assessment;
(c) an assessment has been determined on appeal and there is no right of further appeal; and
(d) where the appellant (or taxpayer) dies and no personal representative applies to the Special Commissioners within two years of his death. In each of the above, the assessment made, agreed to or determined is final and conclusive. Section 97.

However, *Government of Malaysia v. Lin Ting Hsi* [1976] 2 MLJ 141 held that:

> ... the provision of s. 103 is not confined only to one assessment or a composite assessment. The word "assessment" is defined in s. 2 of the 1967 Act to mean any assessment;
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> (3) in the context of ss. 103(1), 106(1) & (3), 143(1) of the Income Tax Act 1967 the word "sufficient" in s. 142(1) means that it is conclusive for the purpose of O. 14, r. 1.

and this is relevant to today's proceedings. See *Sun Man Tobacco Co. Ltd. v. Government of Malaysia* [1973] 2 MLJ 164 in respect of the certificate under s. 106.

Limitation:

It was held in *Chong Woo Yit v. Government of Malaysia (supra)* that at Held (1)):

> By virtue of the proviso to s. 33(1) of the Limitation Act 1953, LIMITATION DOES

> NOT APPLY TO THE COMMENCEMENT OF ANY PROCEEDINGS by the government for the recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s. 91 of the Income Tax Act 1967 NOT MADE in any year of assessment or WITHIN 12 YEARS after the expiration, the Revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.

This was cited in *Government of Malaysia v. Gan Chuan Lian @ Gan Puay Chee* [1992] 1 CLJ 679.

I have considered the judgment in *Government of Malaysia v. Ng Song Choon* [1975] 1 MLJ 131 in respect of the taxpayer being allowed to raise the plea that the claim is statute-barred. The defendant in his statement of defence denies he is liable to any tax at all in respect of the 1971 additional assessment in the sum of RM51,244.16 since the notice of assessment was not issued and served within the time prescribed under s. 91(1) of the Income Tax Act 1967. (Para 5 of the statement of defence dated 23 June 1987):

> Section 9 (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may IN THAT YEAR OR WITHIN TWELVE YEARS AFTER ITS EXPIRATION make an assessment or additional assessment ...

The time prescribed means "12 years".

In support of the defendant's arguments are the judgments in *Government of Malaysia v. Gan Chuan Lian @ Gan Puay Chee* [1992] 1 CLJ 678 and *Chong Woo Yit's (supra).* In the latter, the Court held that the assessment (and the notice) must be issued within 12 years.

> Section 91 (3) The Director General where it appears to him that -
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> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
> (b) any person has been negligent; in connection with or in relation to tax, may AT ANY TIME make an assessment in respect of that person for any year of assessment FOR THE PURPOSE OF MAKING GOOD ANY LOSS OF TAX attributable to the fraud, wilful default or negligence in question.
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> (Emphasis shown)

There is no proof or even an allegation of either wilful neglect or fraud on the part of the defendant in today's case. See also *Inland Revenue Commissioners v. Ross and Coulter & Ors. (Bladnoch Distillery Co. Ltd.)* [1948] 1 All ER 616-693 on this point.

It is evident from the law that if the assessment is made after 12 years, this can only be towards "making good any loss of tax attributable to the fraud ...". The Inland Revenue Authority (IRA) is not permitted, it seems from the tenor of the Act, to make an assessment after 12 years. This makes perfect sense as otherwise the IRA can strike at any taxpayer at any time on a never-ending spree ... and such limitation in the law makes it human and acceptable.

We have to distinguish between "commencement of any proceedings", "assessment", "notice of assessment" and "recovery" and their implications. Isaacs J. in *The King v. The Deputy Federal Commissioner of Taxation for South Australia exparte Hooper L* [1926] 37 CLR, 368 says:

> AN ASSESSMENT is not a piece of paper: it is an official act or operation; it is the commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his known opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called a 'NOTICE OF ASSESSMENT' ... But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the commissioner.

This was cited by Gunn Chit Tuan SCJ in *Chong Woo Yit v. Government of Malaysia (supra)* and by Buttross J. in *A.B.C. v. The Comptroller of Income Tax Singapore* [1959] 25 MLJ 162.

From the above statement of the law ASSESSMENT (See also s. 2 of the Income Tax Act) and NOTICE OF ASSESSMENT have been defined and explained. RECOVERY, however, succeeds when the tax leviable is

paid either in full or to the extent as agreed by the Director-General after negotiation with or request by the taxpayer. The word RECOVER has a technical meaning in law whereby it signifies to recover by action and by the judgment of the court (*Wigens v. Cook* 28 LJCP 312). Proceeding is equivalent to "any action" and civil proceedings may be begun by writ, originating summons, originating motion or petition (Order 5, rule of the Rules of the High Court 1980). Tax due and payable may be recovered by civil proceedings as a debt due to the Government - Section 106(1). COMMENCEMENT OF ANY PROCEEDINGS may take place at any time even after the 12-year period provided the lapse of time between assessment and legal action is reasonable and there is no laches or neglect by the Inland Revenue Authority (IRA) and that the IRA has not been dilatory in assessing and serving the notice of assessment.

I accept the defence that the additional assessment for 1971 of RM51,244.16 is statute-barred and accordingly such sum should be deducted from the total claimed. As there is no sufficient cause to deny the other claims, I hereby grant an order in terms of the plaintiff's O. 14 summons-in-chambers dated 25 April 1988 subject to the deduction of RM51,244.16.

The Supreme Court in *Chong Woo Yit v. Government of Malaysia* [1989] 1 MLJ 473 stated that "as it was not due to any fault on the part of the taxpayer that his appeal to the Special Commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the Special Commissioners of the taxpayer's appeal against the assessments raised against him". (at page 475).

In the spirit of the Supreme Court's observations in *Chong Woo Yit's*, a stay of execution is hereby granted until determination by the Special Commissioners of the defendant's (taxpayer's) appeal against the assessment raised against him in this action.